(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Procedural History

On January 19, 2005, Mr. Patti timely filed a motion to vacate sentence under 28 U.S.C. § 2255. He has filed no other post-conviction challenge to his conviction or sentence. Mr. Patti sought to be resentenced in light of *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005), which held that the Sentencing Guidelines were no longer binding and mandatory, but were instead advisory and were only one of many factors to be considered in fashioning an appropriate sentence. Finding that the Supreme Court's holdings in both *Booker* as well as *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), did not apply to this case, the Magistrate Judge to whom the motion was referred concluded that Mr. Patti's motion should be summarily dismissed and recommended as such to the district court. Appendix 5-10.

On February 25, 2005, the district court entered an order adopting the Report and Recommendation of the Magistrate Judge over Mr. Patti's objections and summarily denied Mr. Patti's motion to vacate, set aside or correct sentence. Appendix 3-4. On March 7, 2005, Mr. Patti filed a timely notice of appeal, which was transmitted to the United States Court of Appeals for the Eleventh Circuit on March 9, 2005. The court of appeals docketed the case on March 14, 2005, but delayed any proceedings pending the district court's decision as to whether to issue a certificate of appealability.

Pursuant to the Federal Rules of Appellate Procedure, the district court construed Mr. Patti's notice of appeal as a motion for certificate of appealability. On April 12, 2005, the district court entered an order denying the motion for certificate of appealability and holding that Mr. Patti had not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). Appendix 2.

On May 4, 2005, Mr. Patti filed a motion for a certificate of appealability in the United States Court of Appeals for the Eleventh Circuit, which was denied on May 23, 2005. *See* Appendix 1. In denying Mr. Patti's motion, the court of appeals held that Mr. Patti had not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2) and further noted that this Court's ruling in *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005), is not retroactively applicable to cases on collateral review.

Statement of Facts

On May 31, 2000, a grand jury returned a sealed, eight-count indictment charging Mr. Patti with tax violations. On February 21, 2001, a twelve-count superseding indictment was returned charging Mr. Patti with six counts of filing false personal income tax returns for the years 1993 through 1998, in violation of 26 U.S.C. § 7206(1), and six counts of filing false corporate tax returns for his business, Patti Shipyard, Inc., for the years 1993 through 1998, in violation of 26 U.S.C. § 7206(1). On December 19, 2001, a grand jury returned a twenty-four count second superseding indictment charging Mr. Patti with additional offenses of conspiring to avoid the payment of federal income and FICA taxes in violation of 18 U.S.C. § 371 and eleven counts of failing to pay federal income and FICA taxes in violation of 26 U.S.C. § 7202 and 18 U.S.C. § 2.

Mr. Patti pleaded guilty to Counts Eight and Thirteen of the second superseding indictment. Count Eight alleged that Mr. Patti filed a false 1996 individual income tax return. Count Thirteen alleged that Mr. Patti conspired to defraud the United States with regard to the collection and payment of employment taxes. Absent from the plea agreement accepted by the district court was any "tax loss" amount or discussion of any guideline sentencing factor.

The Presentence Investigation Report ("PSR") prepared by the U.S. Probation Officer, adopting the government's figures, concluded that the total "tax loss" attributable to Counts One through Twenty-four was $4,804,588.18, resulting in a base offense level of 21. The PSR included a number of guideline adjustments – "obstruction of justice," "sophisticated concealment," and "role

in the offense" – which increased the total offense level to 29.

During a six-day sentencing hearing, the parties vehemently disputed the question of loss as well as the applicability of sentencing enhancements involving obstruction of justice, sophisticated concealment, and role in the offense. Mr. Patti also contended that his sentencing violated *Apprendi*. Overruling all of Mr. Patti's objections, the district court found, using a preponderance of the evidence standard, that the tax loss was $4,791,267.18 (corresponding to a base offense level of 21) and that Mr. Patti had engaged in multiple acts of obstruction of justice (two levels), employed sophisticated concealment (two levels), and was an organizer or leader (four levels), resulting in an adjusted offense level of 29. The district court departed downward by two levels due to the grouping of Counts Eight and Thirteen. Thus, the district court found the total offense level to be 27, which resulted in a guideline range of 70 to 87 months. The district court sentenced Mr. Patti to a term of imprisonment of 79 months (36 months as to Count Eight and 43 months as to Count Thirteen, with such terms to run consecutively).

Pursuant to the sentencing process employed by the district court, the maximum sentence which Mr. Patti faced was dramatically increased on the basis of findings of fact which were neither admitted to by Mr. Patti nor found by a jury beyond a reasonable doubt. The district court chose a sentence in the middle of the guideline range, but did not consider any lower sentence as coming within the scope of allowable discretion.

Mr. Patti, thereafter, took a timely appeal to the United States Court of Appeals for the Eleventh Circuit.

The appeal raised seven issues, most of which concerned sentencing, including the issue of whether the sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), given that the Guideline range was in excess of the statutory maximum for Count Eight as well as for Count Thirteen and consecutive sentences were imposed. The court of appeals affirmed Mr. Patti's conviction and sentence on July 18, 2003. *United States v. Patti*, 337 F.3d 1317 (11th Cir. 2003). Mr. Patti did not file a petition for rehearing, but did petition this Court for certiorari. On January 20, 2004, the Court denied certioriari, *Patti v. United States*, 540 U.S. 1149, 124 S.Ct. 1146 (2004), making the conviction final as of that date. *Clay v. United States*, 537 U.S. 522 (2003).

Following sentencing by the district court, Mr. Patti surrendered to the custody of the Federal Bureau of Prisons on August 12, 2002, and has been incarcerated since that time at the Federal Medical Center in Fort Worth, Texas. Unless earlier reduced, his 79-month term will expire, less good conduct time as calculated by the Federal Bureau of Prisons, on January 4, 2008.

REASONS FOR GRANTING A WRIT OF CERTIORARI

This Court should issue a writ of certiorari for the following two reasons:

1. Petitioner made a substantial showing that he has been denied a constitutional right as a result of *Booker* and therefore, should have been issued a certificate of appealability.

A. This Court Has Not Addressed the Fundamentally Important Question of Retroactive Application of *Booker* to Cases on Collateral Review Which Became Final After *Apprendi* and *Ring*.

The United States Court of Appeals for the Eleventh Circuit, like a number of other lower courts, rushed to find that this Court's decision in *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005), does not apply retroactively to § 2255 cases. *See Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005) (sentence became final before this Court's decision in *Apprendi*); *see also Bey v. United States*, 399 F.3d 1266 (10th Cir. 2005) (sentence became final before this Court's decision in *Apprendi*); *Green v. United States*, 397 F.3d 101 (2d Cir. 2005) (sentence became final before this Court's decision in *Apprendi*); *McReynolds v. United States*, 397 F.3d 479 (7th Cir. 2005).[1] However, this Court has not expressly determined that *Booker* does not apply to cases on collateral review. Rather, *Booker* was confined to cases on direct review: "We must apply today's holdings – both the Sixth Amendment and our remedial interpretation of the Sentencing Act – to all cases on direct review." *Booker*, 125 S.Ct. at 769.

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[1] Although the defendant's sentence in *McReynolds* did not become final until after this Court's decision in *Apprendi* and *Ring*, the decision in that matter should be given limited consideration. The appeal was litigated *pro se* and was submitted without argument. Furthermore, the briefs filed by the appellant did not analyze the *Teague v. Lane*, 489 U.S. 288 (1989), issue in any significant fashion.

Moreover, this Court has not held that *Booker* has no retroactive application to cases on collateral review. As observed by the United States Court of Appeals for the Tenth Circuit in *Bey*: "The Court decided *Booker* on direct appeal and did not expressly declare, nor has it since declared, that *Booker* should be applied retroactively to cases on collateral review." *Bey*, 399 F.3d at 1269. As the United District Court for the District of Oregon observed in *United States v. Siegelbaum*, 359 F. Supp.2d 1104 (D. Ore. 2005), "existing precedent does not definitively answer whether the rule announced in *Blakely/Booker* applies retroactively [to collateral proceedings]."

More specifically, this Court has not determined whether the decision in *Booker* was merely an application of the rule created in *Apprendi* and *Ring*. As discussed in more detail below, while Mr. Patti was indicted before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was decided, he had not yet been sentenced when this Court issued its ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). Thus, his conviction became final after *Ring* but before *Blakely*. Should this Court determine that *Booker* was merely applying the rule established in *Apprendi* and *Ring*, it would implicitly follow that the decision in *Booker* would be applicable to any case on collateral review in which the petitioner's sentence did not become final until after *Apprendi* or *Ring* was decided.

This Court should grant further review to provide the "definitive answer" as to whether *Booker* applies to such cases.

B. *Booker* Should Be Applied Retroactively to Cases on Collateral Review Which Were Not Final Until After *Apprendi* and *Ring*.

Contrary to the court of appeals' conclusion, Mr. Patti should be entitled to the benefit of *Booker*'s subsequently-announced application of *Apprendi* for several reasons. First, Mr. Patti's case was pending on direct appeal until January 20, 2004. He is therefore entitled to invoke, under *Teague v. Lane*, 489 U.S. 288 (1989), any "new rule" of constitutional criminal procedure which was declared prior to that date.[2] That would include any rule announced in either *Apprendi* or *Ring*. Second, even if a *Teague* inquiry were conducted, the burden-of-proof aspects of the holdings of *Booker*, *Blakely*, and *Apprendi* are substantive rulings and hence exempt from the *Teague* rule – even though the decision-maker aspect of the holding in *Apprendi* is not. *See Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 2522 (2004) (discussing *Ring*). Further, even if a *Teague* inquiry were conducted, the burden-of-proof holdings of *Booker*, *Blakely*, and *Apprendi* are watershed rulings and hence exempt from the *Teague* rule for that additional reason.[3]

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[2] The *Teague* doctrine holds that new, judge-made rules of constitutional criminal procedure are not applicable to cases that became final before the rule is announced, unless the rule decriminalizes certain conduct or prohibits the imposition of certain types of punishment for a class of defendants, or constitutes a watershed rule of criminal procedure. *Id.* at 310-12.

[3] Mr. Patti does not concede that *Teague* applies fully to § 2255 motions. This Court continues to emphasize how "the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504, 2511 (2004). Comity plays no role in § 2255 jurisprudence. Even assuming that *Teague* governs his effort

(Continued on following page)

As such, Mr. Patti respectfully submits that the court of appeals erred in finding that the *Booker* decision does not apply retroactively to cases on collateral review and that *Booker* did not create a new substantive change in the law. Alternatively, Mr. Patti maintains that *Booker* created a "watershed" rule and should be applied to cases on collateral review which were not final until after *Apprendi* and *Ring*.

1. Mr. Patti Does Not Invoke Any "New" Rule.

While Mr. Patti was indicted before *Apprendi* was decided, he had not yet been sentenced when the Supreme Court issued its ruling in *Ring*. His conviction then "became final" several months before the decision in *Blakely*. A "case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Thus, if the "rule" Mr. Patti relies on was "newly announced" in either *Apprendi* or *Ring*, it applies to his case without any *Teague* inquiry at all; if in *Blakely* or *Booker*, then a *Teague* analysis is required.

The correct starting point for this analysis is to recognize that either *Apprendi* or *Ring* are the key, new cases upon which Mr. Patti's argument depends. The courts of appeals have uniformly decided that *Apprendi* announced a "new rule" in the *Teague* sense. *See, e.g.*, *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir. 2001) ("*Apprendi* established a new rule of criminal procedure, one

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to obtain a lawful sentence under federal law, the rule Mr. Patti seeks to invoke is available to him as a basis for collateral relief.

that was not dictated by precedent existing before the *Apprendi* decision was released."), *cert. denied*, 536 U.S. 906 (2002). By the time the concept of "statutory maximum" as used in *Apprendi* was clarified – as if it had not been clear enough from *Apprendi* itself – in *Ring*, to include tiered sentencing levels for the same offense, depending upon proof of additional, aggravating facts, guideline sentencing under the mandatory rule of § 3553(b) was doomed. The rule applied in *Booker*, which was presaged six months earlier by *Blakely*, is not a "new rule," but an obvious application of the new rule announced in *Apprendi*, as explicated in *Ring*.

The *Blakely* decision itself begins by stating:

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Blakely, 124 S.Ct. at 2536. Similarly, the *Booker* decision begins, "We hold that both courts [below] correctly concluded that the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." *Booker*, 125 S.Ct. at 746. Justice Breyer's four-justice dissent from the constitutional holding of *Booker* acknowledges that "*Blakely* purports to follow, not to extend, *Apprendi*." *Id.* at 806. In both *Booker* and *Blakely*, in other words, the Court itself recognized that it was taking the rule previously developed in June 2000 in *Apprendi*, and not changing it but simply "apply[ing]" it, directly and without expansion or extension, to a new factual situation under other statutory schemes.

As Justice Scalia wrote for the majority in *Blakely*: "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S.Ct. at 2537. Justice Scalia, and the four justices who joined his *Blakely* opinion, thus did not appear to believe that *Blakely* created a "new rule." Moreover, *Blakely* was at least dictated by *Ring*, if not by *Apprendi* itself. And Mr. Patti's conviction became final more than a year after *Ring* was decided.

In any event, the question here is not whether the *Blakely* decision sets forth a new rule, but whether the constitutional holding of the *Booker* decision is a direct application of *Apprendi* and/or *Ring*, with at most an unexpected practical result: the invalidation of the section of the Sentencing Reform Act which made the guidelines mandatory. The *Booker* case did not announce a new rule of constitutional law; at most, it applied the rule set forth in *Apprendi* and *Ring*, through application of principles of statutory construction and federal severance doctrine, to the Sentencing Reform Act.

The application of the *Booker* ruling to this case does not present a retroactivity problem because both *Apprendi* and *Ring*, announced in June 2000 and June 2002, respectively, were the law of the land before Mr. Patti's conviction became final in January 2004. It was in *Apprendi* that this Court explained that the Sixth Amendment established limits on the imposition of a sentence based on facts which were neither found by a jury nor determined beyond a reasonable doubt. Furthermore, the *Ring* decision made clear that what mattered was not the form of the "finding," but the real effect of a given finding on the defendant's

sentence. *Ring*, 536 U.S. at 604. The *Ring* decision explicitly cautioned against placing "form over substance." *Id.* Moreover, *Ring* showed that on a two-tiered maximum penalty array for one offense, the lower tier was itself a "statutory maximum," as under the Guidelines. What was left undecided, at most, was whether the "maximum" each guideline range established was "statutory" in nature. But to answer that question did not require any "new rule" of constitutional law; it merely required a plain reading of the Sentencing Reform Act and, in particular, the impact of 18 U.S.C. §§ 3553(b) and 3742(e).

The *Blakely* decision also notes that *Ring* did not establish a new rule post-dating *Apprendi*, but instead was itself a straightforward application of *Apprendi*: "In *Ring v. Arizona*, 536 U.S. 592-593 and n.1 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors." *Blakely*, 124 S.Ct. at 2537. Thus, *Blakely* again recognized that the seminal new rule case was *Apprendi*, and that both *Ring* and *Blakely* were mere applications of that June 2000 ruling.

Examination of the various *Blakely* and *Booker* opinions shows that the dissenters did not seriously claim that the rule of *Apprendi*, as applied in *Ring*, did not inexorably lead to those later decisions. The dissenters were, in reality, simply continuing to disagree with the majority decision in *Apprendi* itself. *Blakely*, 124 S.Ct. at 2543 (O'Connor, J., dissenting) (noting that those who subscribe to the *Blakely* majority's analysis are "residents of '*Apprendi*-land' "); *Blakely*, 124 S.Ct. at 2550 (Breyer, J., dissenting) ("The Court makes clear that it means what it said in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).").

Similarly, Justice O'Connor recognized, citing *Teague*'s "dictated by precedent" test, that the *Blakely* decision would be applied to all those defendants whose cases were still pending on direct appeal at the time of *Apprendi* – not just those with appeals pending at the time of *Blakely*. *Blakely*, 124 S.Ct. at 2549 (dissent). The elaboration of federal sentencing requirements set forth in *Booker* therefore applies to Mr. Patti. The remedial portion may be new (severing the statute), but the constitutional rule on which it relies - which is what matters under *Teague* – is not "new" for retroactivity purposes. Thus, the *Teague* doctrine is inapplicable.

2. The Court's Decision in *Booker* Should Be Applied Retroactively to Cases on Collateral Review Because It Is a Substantive, Not Procedural Rule.

Even if the "rule" announced in *Booker* – or even in *Blakely* – were deemed to be "new" in that case, *Teague* would still not govern. In *Teague*, this Court ruled that new constitutional rules of criminal procedure are not retroactively applicable to cases on collateral review unless they meet one of two narrow exceptions. In contrast to procedural rules, however, new rules of substantive law are not subject to *Teague*. Substantive rules may be retroactively applied to cases on collateral review. *See Summerlin*, 124 S.Ct. at 2522-23; *Bousley v. United States*, 523 U.S. 614, 620-21 (1988). Thus, the restrictions developed in *Teague* apply only to new procedural rules, not to new substantive rules. *Bousley*, 523 U.S. at 619-20 ("because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.").

Under this structure, the *Apprendi* doctrine, as applied to guidelines sentencing, has procedural elements (notice in the charging instrument, decision by jury rather than judge), but its heart is substantive – an elevation on constitutional grounds of the burden of proof. Moreover, the remedial aspect announced in *Booker* is also substantive – an expansion in the scope of the sentencing court's discretion, albeit an expansion designed to remove the condition for viewing the top of each guideline range as a "statutory maximum." In *Summerlin*, the Court held that the aspect of *Apprendi* which requires certain facts to be found by a jury rather than by a judge was procedural, not substantive, and hence, *Teague* applied and barred retroactive application of *Ring* to findings of aggravating factors in a death penalty case when raised in a petition for writ of habeas corpus. But the *Summerlin* Court expressly reserved the question of whether the beyond-a-reasonable doubt requirement of *Apprendi* would be fully retroactive in federal habeas corpus proceedings. *Blakely*, 124 S.Ct. at 2522 n.1. The issue was not before the Court in *Summerlin*, because the Arizona laws at issue there already mandated that judges find aggravating circumstances in death penalty cases by that more stringent, beyond-a-reasonable doubt standard.

This case concerns the other half of the *Apprendi* decision – the burden of proof. The controlling cases are those concerning whether changes in the burden of proof are substantive, and whether changes in the burden of proof favorable to the defendant apply retroactively. In this regard, other post-*Teague* burden of proof cases apply changes in the burden of proof retroactively. *See, e.g., Gaines v. Kelly*, 202 F.3d 598, 601-05 (2d Cir. 2000). Similarly, the line of pre-*Teague* cases considering changes

in the burden of proof have also held that such changes are so essential to accurate fact-finding that they must be applied retroactively. Thus, *In re Winship*, 397 U.S. 358 (1970), was held retroactive in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), was held retroactive in *Hankerson v. North Carolina*, 432 U.S. 233 (1977). These cases compel the conclusion that the *Apprendi/Ring* change in the burden of proof is substantive.

As such, *Booker*'s remedial holding is substantive because it "alters the range of conduct [and] the class of persons that the law punishes." *Summerlin*, 124 S.Ct. at 2523. *Booker*'s repeal of the mandatory sentencing rules alters a defendant's substantive rights by placing certain conduct and groups of persons outside the power of the guidelines to require mandatory punishment. Therefore, the ruling is substantive regardless of the fact that a defendant could receive the same sentence before and after *Booker*. *See also Lindsey v. Washington*, 301 U.S. 397, 100-02 (1937).

3. Alternatively, *Booker* and *Blakely* Implicate Fundamental Fairness Under *Teague*'s Second Exception for Watershed Rulings.

Alternatively, Mr. Patti maintains that *Booker* created a "watershed" rule. In *Teague*, the Court recognized an exception to its rule prohibiting the retroactive application of new constitutional rules of criminal procedure for "watershed" decisions critical to the fundamental fairness and accuracy of the criminal process. *Teague*, 489 U.S. at 311. If it does not hold that *Booker* states a substantive new rule, this Court should hold that *Booker* and *Blakely* created "watershed" new rules applicable to this case on collateral review.

In *Summerlin*, this Court ruled that *Ring* was not a watershed ruling that could be retroactively applied to cases on collateral review. In *Ring*, the Court applied *Apprendi* to require jury findings of aggravated facts supporting a death sentence, but the only issue in that case involved the identity of the fact-finder since the statute at issue there already required the judge to make findings of aggravated facts supporting death beyond a reasonable doubt. *Ring*, 536 U.S. at 597, 609. *Summerlin* involved the finder of fact but not the standard of proof. *Summerlin*, 124 S.Ct. at 2522 n.1. Writing for the majority, Justice Scalia stated in *Summerlin* that "[t]he right to jury trial is fundamental to our system of criminal procedure." *Id.* at 2526. As the dissenting justices note, "[t]he majority does not deny that *Ring* meets the first criterion of *Teague*, that its holding is 'implicit in the concept of ordered liberty.'" *Id.* The Court declined to find retroactivity instead on a secondary inquiry involving accuracy, explaining that the question was not whether juries or judges were more accurate finders of fact, but "whether judicial factfinding so '*seriously* diminish[es]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach." *Summerlin*, 124 S.Ct. at 2525 (quoting *Teague*, 312-13).

In contrast to *Ring*, *Blakely*'s application to the federal Sentencing Guidelines requires jury findings beyond a reasonable doubt. This Court explained the crucial nature of this right in *In re Winship*:

> The reasonable-doubt standard plays a vital rule in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error . . . "[A] person accused of a crime . . . would be at a severe

> disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."
>
> * * *
>
> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

In re Winship, 397 U.S. at 363-64 (citations omitted).[4]

Similarly, in *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), citing *Winship*, this Court described the reasonable doubt standard as "a prime instrument for reducing the risk of convictions resting on factual error." In *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), the Court held that the failure to give a proper reasonable doubt instruction was equivalent to denial of the right to jury trial. "[T]o

[4] This Court applied *Winship* to habeas corpus proceedings in *Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979) (explaining applicability of doctrine on collateral review).

hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." *Id.* at 279. Accordingly, the Court found that error in failing to instruct the jury correctly about reasonable doubt could never be harmless and constitutes structural error. *Id.* at 280-81.

Imposing a sentence based on potentially inaccurate factual findings is equally as important as upholding a conviction based on such findings. This is particularly true given the fact that sentence enhancements under the guidelines can double, triple, or quadruple a sentence or even increase a sentence by a multiplier of more than 30. *Booker*, 125 S.Ct. at 752 (citing examples). If sentencing facts must be proven beyond a reasonable doubt to a jury, they are indistinguishable from elements of the offense. Here, the imposition of sentence enhancements based on a preponderance of the evidence creates "an impermissibly large risk" that an individual "innocent" of conduct on which the sentence enhancements are based would receive a significantly longer term of imprisonment. *Teague*, 489 U.S. at 312.

4. The Due Process Clause Requires Retroactive Enforcement.

Federal due process law should also compel the conclusion that *Booker* must apply retroactively. The Supreme Court requires that new constructions of the elements of offenses must apply retroactively. *Fiore v. White*, 531 U.S. 225 (2001). After *Apprendi*, the circuit courts have acknowledged that aggravating sentencing factors are now akin to pre-existing elements. *See, e.g.*,

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (en banc). *Fiore* stands for the somewhat unexceptional principle that a person cannot be convicted of and punished for a crime if its critical elements are not proven beyond a reasonable doubt. *Fiore*, 531 U.S. at 228 (*citing Jackson v. Virginia*, 443 U.S. 307, 316 (1979), and *In re Winship*, 397 U.S. at 364); *see also Bunkley v. Florida*, 538 U.S. 835 (2003) (per curiam).

The *Booker* decision, too, is a substantive one. *Booker* transformed the Sentencing Guidelines from a mandatory rule of decision under 18 U.S.C. § 3553(b) to an advisory factor under § 3553(a)(4). Formerly, a sentencing court was obliged to impose a sentence within the applicable guideline range unless the defendant could meet the limited and stringent requirements for a downward (or upward) departure. 18 U.S.C. § 3553(b). Now, however, a sentencing court is instructed to impose a sentence that comports with the principles enunciated in 18 U.S.C. § 3553(a). Such a sentence is one "not greater than necessary" yet still "sufficient" to achieve the statutory goals, which include reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, protecting the public, and providing the defendant with the most effective manner of correctional treatment. 18 U.S.C. § 3553(a). That sentence is not necessarily the guideline sentence. In contrast, the factors set forth in § 3553(a) previously could be considered only in selecting a sentence within mandatory guidelines. Departures were limited to narrow grounds and a large number of matters, including the defendant's social and personal history, age, and health, were largely precluded as bases for departure. As such, the transformation of the guidelines into an advisory system works a substantive

alteration in federal sentencing law in terms of the sentence outside the guidelines.

For all of these reasons, the constitutional rule announced in *Apprendi* and clarified in *Ring*, as applied to federal sentencing under the Guidelines in *Booker*, should be held applicable to cases on collateral review which became final after *Apprendi* and *Ring*.

2. The court of appeals applied the wrong legal standard to Petitioner's request for a certificate of appealability ("COA") seeking permission to appeal the district court's summary denial of his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The court of appeals converted the COA process into the appeal itself in clear violation of the text and purpose of § 2253(c), and applied the standard for granting a COA in a way that conflicts with the relevant precedent established by this Court.

Section 2253(c)(1) of Title 28, United States Code, provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (B) the final order in a proceeding under section 2255." Section 2253(c)(2) further provides that a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." In denying Petitioner's request for a COA, the court of appeals misconstrued the standard, as established by this Court, for granting a COA.

In construing 28 U.S.C. § 2253(c)(2), this Court has explained that the petitioner must show "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different

manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). That is, a COA must issue where the petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Here, in denying Petitioner a COA, the court of appeals focused not on whether "reasonable jurists could debate whether" the district court should have found for Petitioner, but on its own conclusion that Petitioner's claim lacked merit. Such analysis is clearly prohibited by this Court's interpretation of 28 U.S.C. § 2253(c)(2).

The plain language of the statute, which is necessarily the starting point of the analysis, *see Williams v. Taylor*, 529 U.S. 420, 431 (2000), makes clear that entitlement to a COA turns not on whether a petitioner can establish ultimate entitlement to relief prior to appeal, but on whether he can make a "substantial showing of the denial of a constitutional right" so as to warrant permitting him to appeal. *See* 28 U.S.C. § 2253(c)(2). Furthermore, in seeking a certificate of appealability, a petitioner's entitlement to pursue an appeal is not conditioned on persuading the appellate court, in advance, that the appeal must ultimately prevail. *See Miller-El*, 537 U.S. at 335-36. In fact, the Eleventh Circuit has noted a court is neither required nor permitted to make a full consideration of the factual and legal merits of the claims raised by the Petitioner in determining whether to issue a COA. *See Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1267 (11th Cir. 2004). Instead, "[t]he question [in considering a motion for a certificate of appealability] is the debatability

of the underlying constitutional claim, not the resolution of that debate." *See Miller-El*, 537 U.S. at 1042; *see also Slack*, 529 U.S. at 482 (describing the analysis as to whether to grant a certificate of appealability as a "threshold inquiry").

As such, one court's determination that a petitioner's underlying claim lacks merit is insufficient, without more, to establish that a COA should not issue. Instead, entitlement to a COA turns simply on whether the petitioner's claim is sufficiently plausible that it "deserve[s] encouragement to proceed further." Were that not the case, only those petitioners who ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the COA process would be converted, paradoxically, into the appeal itself.

Here, in its order denying Mr. Patti's request for a certificate of appealability, the court of appeals noted that this Court's ruling in *Booker* is not retroactively applied to cases on collateral review. *See* Appendix 1. As such, the court of appeals focused on and rejected the merits of the legal arguments raised by Mr. Patti in support of his § 2255 motion and then summarily concluded, on that basis and without any additional analysis, that Petitioner had not made the requisite "substantial showing" for a COA. As noted above, such an approach cannot be reconciled with the text or purpose of the statute and was clearly beyond the analysis permitted by this Court's interpretation of § 2253. The court of appeals thus clearly erred in basing its denial of a COA on its own finding, without more, that the underlying claim lacked merit.

For this reason as well, the writ should be granted.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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September 23, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11347-A

FRANK M. PATTI, SR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(Filed May 23, 2005)

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The U.S. Supreme Court's ruling in *United States v. Booker,* 543 U.S. 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), is not retroactively applicable to cases on collateral review. *Varela v. United States,* 400 F.3d 864, 868 (11th Cir. 2005).

/s/ Stanley F. Birch, Jr.
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

CASE NO: 3:00cr44/LAC
3:05cv15/LAC/MD

vs.

FRANK M. PATTI, SR.

ORDER

The defendant has filed a notice of appeal (doc. 575) and a motion for certificate of appealability (doc. 576) of the order entered on February 25, 2005. Unless a certificate of appealability is issued, the defendant may not take an appeal from the final order denying section 2255 relief. *See* 28 U.S.C. 2253(c)(1)(B). Such a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Because the defendant has not made a substantial showing of the denial of a constitutional right, and for the reasons set forth in this court's order of February 25, 2005, a certificate of appealability is DENIED.

DONE AND ORDERED this 12th day of April, 2005.

s/ L.A. Collier
LACEY COLLIER
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

VS

CASE NO: **3:00cr44/LAC**
3:05cv15/LAC/MD

FRANK M. PATTI, SR.

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the defendant take nothing and that the motion to vacate, set aside or correct sentence is summarily DENIED.

WILLIAM M. McCOOL,
CLERK OF COURT

February 25. 2005
DATE

/s/ C. Justice
Deputy Clerk

Entered On Docket: 2/25/2005 By: cbj
Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCRP
Copies mailed to: Hensel, Comisky

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

CASE NO: 3:00cr44/LAC
3:05cv15/LAC/MD

vs.

FRANK M. PATTI, SR.

ORDER

Upon consideration of the Report and Recommendation of the Magistrate Judge filed on February 9, 2005, pursuant to 28 U.S.C. § 636(b)(1)(B), and after reviewing objections to the Recommendation, the Recommendation is adopted as the opinion of the Court.

Accordingly, it is ORDERED:

The motion to vacate, set aside or correct sentence (doc. 569) is summarily DENIED.

DONE AND ORDERED this 25th day of February, 2005.

s/ L.A. Collier
LACEY A. COLLIER
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

FRANK M. PATTI, SR.

3:00cr44/LAC
3:05cv15/LAC/MD

REPORT AND RECOMMENDATION

This matter is before the court upon an amended motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 (doc. 569). Rule 4(b) of the Rules Governing Section 2255 Proceedings provides in part that "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified." After a review of the record, it is the opinion of the undersigned that the instant motion should be summarily dismissed.

Defendant pleaded guilty to one count of filing a false personal tax return and one count of conspiracy to avoid payment of federal income and FICA taxes in exchange for dismissal of all other counts against him. His conviction and sentence were affirmed on July 18, 2003, the Supreme Court denied his request for a petition for certiorari on January 20, 2004 and the original § 2255 petition was timely filed on January 19, 2005. In the instant motion, defendant raises a single ground for relief and requests

that he be resentenced in accordance with the Supreme Court's recent decision in *United States v. Booker*.[1]

In *Apprendi v. New Jersey*,[2] the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. at 2362-63. *See also Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 2432, 153 L.Ed.2d 556 (2002) (concluding under *Apprendi* that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Since *Apprendi* was decided, the Supreme Court has decided two cases that relate to federal sentencing, *Blakely v. Washington*,[3] and *United States v. Booker*.

As clarified in *Blakely*:

> the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See *Ring*, *supra*, 536 U.S. at 602, 122 S.Ct. at 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (*quoting Apprendi*, *supra*, 503 U.S. at 483, 120 S.Ct. at 2348)). . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional

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[1] *United States v. Booker*, 125 S.Ct. 738, 2005 WL 50108 (2005).

[2] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000).

[3] *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

> facts, but the maximum he may impose *without* any additional findings.

124 S.Ct. at 2537-38 (emphasis in original, some citations omitted); *see also In re Dean*, 375 F.3d 1287, 1290 (11th Cir. 2004) (quoting *Blakely*).

In *United States v. Booker*, 125 S.Ct. 738, 2005 WL 50108 (2005), the Supreme Court extended its holding in *Blakely* to the Sentencing Guidelines, holding that the mandatory nature of the federal guidelines rendered them incompatible with the Sixth Amendment's guarantee to the right to a jury trial. This does not mean, however, that *Booker* can be applied to cases in which the conviction is final, a fact which is crucial to the court's consideration of the instant motion. Both language within *Booker*, discussed *infra*, and Supreme Court precedent indicate otherwise.

In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) the Supreme Court held that the Sixth Amendment's guarantee of the right to a jury trial applied to the states. In *DeStephano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968) the Court held that *Duncan* would not be given retroactive application – that it applied only to those cases that were not final at the time it was decided, and that it did not apply to cases on collateral attack. The Court reasoned that the right to a jury trial was fundamental to our system of justice, but that a trial without a jury would not necessarily result in an inaccurate verdict. Therefore, it would not be necessary to grant a new trial to every person convicted without a jury.

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) the Supreme Court held that only a

jury, not a judge, could make findings on the aggravating factors necessary to invoke the death penalty. In *Schriro v. Summerlin*, ___ U.S. ___, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) the Court held that *Ring* applied only to those cases that were not final at the time it was decided, and that it did not apply to cases on collateral attack. The Court reasoned that the rule announced in *Ring* was a procedural rule, not a substantive one, because it did not define an element of a crime. Rather, it determined the manner in which fact finding is done. The *Schriro* Court relied on *DeStephano, supra,* noting that "[i]f . . . a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." 124 S.Ct. at 2526.

This is instructive on the application of *Booker.* The *Booker* Court expressly noted that its holding was to be applied retroactively to "all cases . . . pending on direct review or not yet final." *Booker* at *29. It did not announce that the new rule would apply retroactively for cases on collateral attack, such as this one. This reasoning necessarily follows from *DeStephano* and *Schriro.* In those cases the court held that it was not impermissibly inaccurate to conduct a criminal trial entirely without a jury, nor for a judge alone to find aggravating factors necessary to trigger a death sentence. Based on those holdings, it is difficult to conclude that a hearing in which a judge finds only aggravating factors that result in an increased sentence could be impermissibly inaccurate. See *Schriro,* 124 S.Ct. at 2526.

Moreover, the *Booker* Court cited prior precedent with approval, stating that "[T]he constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine

the maximum permissible punishment." *Booker,* 2005 WL 50108 at *14 (citations omitted). The significance of this is that unlike substantive rules, new rules of procedure generally are not retroactive. *Schriro v. Summerlin,* ___ U.S. ___, 124 S.Ct. 2519, 2523, 2526, 159 L.Ed.2d 442 (2004) ("([I]t does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart.").

Finally, the Eleventh Circuit has concluded that neither *Booker* nor *Blakely* applies retroactively to cases on collateral review. *See In re Anderson,* ___ F.3d ___, 2005 WL 123923 (11th Cir. 2005) (holding that only the Supreme Court can make a new rule retroactive on collateral review, and that it must do so explicitly). This defendant has had his full trial and one round of appeals. Since *Booker's* effect on sentencing guidelines cases is not retroactive on collateral review, it is not applicable to this § 2255 motion, and defendant is not entitled to relief on this ground.

Based on the foregoing, it is respectfully RECOMMENDED:

The amended motion to vacate, set aside, or correct sentence (doc. 569) be summarily DENIED.

At Pensacola, Florida, this 9th day of February, 2005.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).